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6                   UNITED STATES DISTRICT COURT  
7                   WESTERN DISTRICT OF WASHINGTON  
8                   AT SEATTLE

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10                  UNITED FOOD AND COMMERCIAL  
11                  WORKERS, LOCAL 21,

12                  Plaintiff,

13                  v.

14                  MULTICARE HEALTH SYSTEM,

15                  Defendant.

16                  Case No. C10-1646RSL

17                  ORDER GRANTING  
18                  DEFENDANT'S MOTION FOR  
19                  SUMMARY JUDGMENT AND  
20                  DENYING PLAINTIFF'S MOTION  
21                  TO COMPEL ARBITRATION

22                  **I. INTRODUCTION**

23                  This matter comes before the Court on a motion for summary judgment filed by  
24                  plaintiff United Food and Commercial Workers, Local 21 (the "Union") to compel  
25                  arbitration of its grievance against the employer, MultiCare Health System ("MultiCare")  
26                  and on MultiCare's motion for an order stating that the dispute is not substantively  
                arbitrable. The parties agree that the subject matter of the grievance is covered by their  
                collective bargaining agreements. The only disputes are: (1) whether the Court or an  
                arbitrator should determine whether the grievance can be resolved in a single,

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28                  ORDER - 1

1 consolidated arbitration, and (2) if the Court decides the issue, whether it can order  
2 consolidated arbitration.

3 For the reasons set forth below, the Court grants defendant's motion for summary  
4 judgment and denies plaintiff's motion to compel arbitration.

## 5 II. DISCUSSION

### 6 A. Background Facts.

7 MultiCare is a not-for-profit healthcare organization that serves the Southern Puget  
8 Sound region. It includes four hospitals and numerous other healthcare centers and  
9 clinics. The Union represents eight collective bargaining units at MultiCare, and it has  
10 negotiated a separate collective bargaining agreement ("CBA" or "contract") on behalf of  
11 each bargaining unit.

12 In July 2009, defendant announced it was changing its policy regarding employee  
13 furloughs. In the past, it had paid employees who were furloughed due to infectious  
14 conditions. Under the new policy, employees furloughed due to infectious conditions  
15 would be required to use their accrued paid time off. On July 14, 2009, the Union filed a  
16 Step 1 grievance over the issue. The grievance alleged that the issue involved a  
17 mandatory subject of bargaining and stated, "The Employer has violated the recognition  
18 clause of all UFCW Local 21 Collective Bargaining Agreements by the announcement of  
19 discontinuing MHS practice of paying employees furloughed by Employee Health or  
20 Infection Control due to infectious conditions." Declaration of Pam Blauman, (Dkt. #12),  
21 Ex. B. When the parties were unable to resolve the matter through the grievance process,  
22 the Union submitted it for arbitration.

1       **B. Analysis.**

2              Summary judgment is appropriate when, viewing the facts in the light most  
3 favorable to the nonmoving party, the records show that “there is no genuine issue as to  
4 any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R.  
5 Civ. P. 56(a). Once the moving party has satisfied its burden, it is entitled to summary  
6 judgment if the non-moving party fails to designate, by affidavits, depositions, answers to  
7 interrogatories, or admissions on file, “specific facts showing that there is a genuine issue  
8 for trial.” Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

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10          As an initial matter, plaintiff argues that defendant orally agreed to submit this  
11 dispute to a single arbitrator. Because defendant has denied that assertion and the  
12 evidence is conflicting, the matter cannot be resolved by these motions for summary  
13 judgment. The Court therefore considers the issues regardless of any such oral  
14 agreement.

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16          The Court must determine whether the parties intended to arbitrate this dispute.  
17 The Court makes the determination by applying the “federal substantive law of  
18 arbitrability” with “a healthy regard for the federal policy favoring arbitration.”  
19 Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc., 473 U.S. 614, 626 (1985)  
20 (explaining that “as with any other contract, the parties’ intentions control, but those  
21 intentions are generously construed as to issues of arbitrability”). “[A]ny doubts  
22 concerning the scope of arbitrable issues should be resolved in favor of arbitration.” Id.  
23 (quoting Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25  
24 (1983)). The standard for a finding of arbitrability is “not high.” See Simula, Inc. v.  
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1     Autoliv, Inc., 175 F.3d 719, 721 (9th Cir. 1999) (explaining that to require arbitration,  
2 plaintiff's "factual allegations need only 'touch matters' covered by the contract  
3 containing the arbitration clause and all doubts are to be resolved in favor of  
4 arbitrability").

5                 In general, issues of arbitrability are for the courts, while procedural issues are left  
6 to arbitrators. See, e.g., First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944  
7 (1995). The Supreme Court has explained that "questions of arbitrability" include "the  
8 kind of narrow circumstance where contracting parties would likely have expected a court  
9 to have decided the gateway matter, where they are not likely to have thought that they  
10 had agreed that an arbitrator would do so, and consequently, where reference to the  
11 gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that  
12 they may well not have agreed to arbitrate." Howsam v. Dean Witter Reynolds, Inc., 537  
13 U.S. 79, 83-84 (2002). The *Howsam* court provided two examples of such "gateway  
14 disputes" that should be decided by a court: (1) a dispute regarding "whether the parties  
15 are bound by a given arbitration clause" and (2) "a disagreement about whether an  
16 arbitration clause in a concededly binding contract applies to a particular type of  
17 controversy." Id. at 84. The Court further explained that "'procedural questions that  
18 grow out of the dispute and bear on its final disposition' are presumptively not for the  
19 judge, but for an arbitrator, to decide." Id. (quoting John Wiley & Sons, Inc. v.  
20 Livingston, 376 U.S. 543, 557 (1964)). In this case, the issue does not involve whether  
21 the parties are bound by the arbitration clauses. Undisputedly, they are. Nor does it  
22 involve the issue of whether the arbitration clauses cover the policies at issue, which they  
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1 do. Rather, the issue relates to how the arbitration will be conducted. However, not all  
2 issues about the conduct of arbitrations are “procedural.” In the Supreme Court’s recent  
3 decision *Stolt-Nielsen S.A. v. AnimalFeeds Internat'l Corp.*, \_\_ U.S. \_\_, 130 S. Ct. 1758  
4 (2010), the Supreme Court held that imposing class arbitration on parties who had not  
5 agreed to it was inconsistent with the Federal Arbitration Act, (“FAA”), 9 U.S.C. § 1 *et*  
6 *seq.* In this case, although the parties to the CBAs, the Union and MultiCare, agreed to  
7 arbitrate certain issues regarding pay and leave, the contracts do not reflect an intent to  
8 conduct a single arbitration on behalf of all bargaining units. None of the contracts refers  
9 to consolidating grievances. Moreover, the contracts’ arbitration provisions are different.  
10 Most notably, two of the contracts provide that the arbitrator will be selected from a panel  
11 of arbitrators named in the contract or its attachment. The arbitrator who will decide the  
12 dispute is the next in line in the panel. That procedure cannot be reconciled with the  
13 procedure used in the other six contracts, whereby the arbitrator will be chosen from a list  
14 of seven or eleven potential arbitrators provided by the Federal Mediation and  
15 Conciliation Service. The fact that the selection procedures are different further  
16 undermines an argument that the parties intended consolidated arbitration. Moreover, if a  
17 single arbitrator were selected to determine this issue, that arbitrator would necessarily  
18 exceed the scope of his or her authority by deciding the issue under contracts that did not  
19 provide for his or her appointment.

22       Although the Ninth Circuit has not addressed whether consolidation is a  
23 procedural issues, the Union notes that two other circuits have concluded that it is.  
24 Employers Ins. Co. of Wausau v. Century Indem. Co., 443 F.3d 573, 578 (7th Cir. 2006)  
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(holding that the issue of whether issues under two agreements between the parties should be consolidated was for the arbitrator); Shaw's Supermarkets, Inc. v. United Food and Commercial Workers Union, Local 791, 321 F.3d 251 (2003) (holding that consolidation of a dispute under three collective bargaining agreements was an issue for the arbitrator). Neither case, however, appears to have involved contracts with conflicting procedures for choosing an arbitrator. Moreover, both cases were decided prior to *Stolt-Nielsen* and focused on the *absence* of evidence that the parties disfavored consolidated arbitration. The *Stolt-Nielsen* Court, however, held that the absence of such evidence was insufficient to establish that the parties agreed to authorize class arbitration. Stolt-Nielsen, 130 S. Ct at 1776. In this way, the *Stolt-Nielsen* decision is consistent with prior Supreme Court authority counseling that courts, not arbitrators, should decide certain gateway issues to avoid forcing the parties to arbitrate issues they did not agree to arbitrate. Howsam, 537 U.S. at 83-84. For all of those reasons, the Court concludes that the issue of consolidation is one for the Court, not for the arbitrators.

Having so found, the Court considers whether to order consolidation. The Court declines to do so because the parties did not agree to it. That holding is also consistent with Ninth Circuit precedent. In *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir. 1984), the court affirmed a district court decision denying consolidated arbitration because the parties did not agree to it. The outcome in this case should be no different.

### III. CONCLUSION

For all of the foregoing reasons, the Court GRANTS defendant's motion for

1 summary judgment (Dkt. #9) and DENIES plaintiff's motion for summary judgment  
2 compelling arbitration (Dkt. #11).

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4 DATED this 3rd day of March, 2011.

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8 Robert S. Lasnik  
United States District Judge